



May 7, 2001

Ms. Joan Kennerly
Senior Assistant City Attorney
City of Irving
P.O. Box 152288
Irving, Texas 75015-2288

OR2001-1854

Dear Ms. Kennerly:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 146824.

The City of Irving (the "city") received a request for information concerning the gross sales taxes paid and gross alcohol sales made by seven named businesses for the past three years. You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 321.3022(c) of the Tax Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹ We have also reviewed letters from Ram International, Champps Entertainment, Inc., Tenaya, Inc., Cool River Restaurant Las Colinas, L.P., and S&A Restaurant Corp. who, in addition to the city's section 552.101 claim, assert the requested information is excepted under section 552.110 of the Government Code. Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released).

¹ We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 552.101 protects from required disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information protected by other statutes. You state the requested information is excepted from public disclosure under section 321.3022(c) of the Tax Code. Section 321.3022 states in pertinent part:

(a) The comptroller on request shall provide to a municipality that has adopted a tax under this chapter and that has a population of not more than 275,000 information relating to the amount of tax paid to the municipality under this chapter during the preceding or current calendar year by each person doing business in the municipality who annually remits to the comptroller state and local sales tax payments of more than \$100,000.

(b) A request for information under this section must be made in writing by the municipality's mayor or chief administrative officer.

(c) Information received by a municipality under this section is confidential, is not open to public inspection, and may be used only for the purpose of economic forecasting.

Tax Code § 321.3022(a), (b), (c). From the documents you have provided to this office, it is unclear who submitted the tax return information to the city. If the city received the tax returns as part of the taxpayer's submission with its gross sales report to the city, then the tax return information is not confidential under section 321.3022. If the city obtained the tax returns from the comptroller, then the city must withhold them under section 321.3022. In either case, the gross sales reports maintained by the city pursuant to ordinance 3768 are not protected from disclosure under section 321.3022 of the Tax Code. We will consider the third parties' claims in the event the information is not confidential under section 321.3022.

Tenaya and S&A Restaurant assert that the requested information is excepted from public disclosure under section 552.110 of the Government Code. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. The governmental body, or interested third party, raising this exception must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from disclosure. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

After reviewing Tenaya's and S&A Restaurant's arguments and the submitted documents, we conclude that neither party has provided a "specific factual or evidentiary showing," but

rather “conclusory and generalized allegations” that substantial competitive injury would likely result from the disclosure. Accordingly, the city may not withhold the requested information under section 552.110 of the Government Code. If the tax information is not confidential under section 321.3022 as explained above, you must release all of the requested information to the requestor.

Tenaya and Cool River also argue that the tax information is confidential under sections 111.006 and 151.027 of the Tax Code and Attorney General Opinion No. H-661 (1975). Sections 111.006 and 151.027 apply to the comptroller’s office and make confidential information submitted to the comptroller or information that the comptroller obtained during the course of an examination conducted under chapters 111 and 151. *Cf.* Open Records Decision No. 520 (1989) (section 151.027 of the Tax Code applies only to records and information *in the custody of the comptroller*; it has no application to such information in the possession of another governmental body); Attorney General Opinion No. H-661 (1975) (*comptroller* may not release information as to the amounts of tax paid by a particular taxpayer). Thus, neither section applies here. Likewise, Attorney General Opinion No. H-661 addressed the predecessor to section 111.006, and therefore, it also is not applicable to the information at issue.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at 877/673-6839.

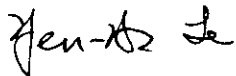
The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/DBF/seg

Ref: ID# 146824

Encl. Submitted documents

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